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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 209.

EL HOSS ENGINEERING AND TRANSPORT CO., LTD.,

Petitioner,

against

AMERICAN INDEPENDENT OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION.

Question Presented.

Petitioner's statement of "questions presented" is incorrect and is prefaced by a paragraph of alleged "facts" which is highly distorted, as will be shown. Among other things, it states as a fact that a contract to arbitrate was made although this is the real issue to be decided.

The only real question here is one of the proper construction of the instrument dated October 1, 1959 (49-83).* Therein lies the difference between the District Court opinion, and that of the Court below.

The question is:

Did the Court of Appeals properly construe said instrument in finding that, by specific and express language, all of the terms of the 54 page instrument, including the arbi-

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* References by number only are to the Appendix to the main brief for respondent-appellant in the Court below contained in a separate volume.

tration clause, were only qualifiedly "accepted" by respondent, "subject to" certain financial conditions first being performed within a certain specified time, and therefore, as requiring that the dispute in the affidavits as to whether these financial conditions were performed, waived, or excused, must be determined by a trial, rather than by arbitration, because only if they were performed, waived, or excused would the arbitration clause become effective.

There is no conflict between Federal and New York law in regard thereto, as we shall see. Therefore, no choice of conflicting law is involved.

Statement of the Case.

A brief statement of facts is necessary in order to correct the misleading picture given by the Petition.

This is a case where petitioner was to receive a very substantial contract providing it met certain financial conditions which were understandably vital to respondent. Petitioner failed to meet the conditions and hence failed to get the contract. The contract was thereupon awarded to another concern which met the conditions and thus got the contract.

In 1959, respondent proposed to sell its transportation equipment in Kuwait valued at nearly one million dollars and to lease back this equipment from the successful bidder at a substantial rental for use in connection with its oil field operations in Kuwait. It distributed a 54 page instrument upon which prospective bidders could tender bids.

On the last page of this instrument, below the signature of the bidder, there was a space for the acceptance of the best bid, by respondent, with a proviso referring to each and every one of the thirteen Sections and Attachments of the instrument, totalling 54 pages, and stating that they

were "accepted" by respondent only "subject to compliance" with certain specified financial conditions within 14 days (83).

Part of what was thus qualifiedly "accepted" by respondent, providing certain financial conditions were performed within 14 days, was an arbitration clause contained in Section One of the instrument.

These financial conditions involved a guarantee of payment by an acceptable financial institution of almost a million dollars as the purchase price of the equipment to be sold by respondent, and a performance bond relating to the services to be performed by petitioner, as well as insurance relating to the equipment and the performance of services.

Naturally, if the financial assurances were not received, respondent was not willing to sell or go ahead with the transaction at all so its acceptance of the successful bidder's tender was made "subject to" these financial conditions first being met.

Thus, the entire transaction contemplated by the proposed agreement depended on the financial conditions first being performed.

Misrepresentations in Petition.

The Petition baldly asserts that a contract was "entered into" containing an arbitration clause covering "any disagreement,"* and also that there was performance under the alleged contract (pp. 2-3, 5). These statements are misrepresentations and highly misleading. They are not supported by any reference to the record.

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* A dispute as to whether a binding contract to arbitrate was made is not arbitrable but must be decided by a court or jury under Section 4 of the Federal Arbitration Act, 9 U. S. C. A. §4. Moreover, what was to be arbitrated here if the clause became effective was limited. On such important matters as the very existence or termination of the agreement, arbitration was not to apply (51, 49-50, 92, 111-112; also p. 7 of main brief and pp. 4-5, 6-8 of reply brief of appellant below).

The vital fact is that each and every provision of the instrument dated October 1, 1959, including the arbitration clause, was only qualifiedly accepted by respondent because at the top of the signature page all thirteen Sections and Attachments totalling fifty-four pages are referred to (the arbitration clause being contained in paragraph 11 of Section One), and then these are "accepted" by respondent only "subject to compliance" with the financial conditions referred to within 14 days (83).

The Petition carefully avoids discussing the language in the first paragraph of the signature page which identifies each and every term of the instrument dated October 1, 1959, including the arbitration clause, and is then followed by the qualified and conditional acceptance of respondent (83).

No attempt is made by petitioner to show that this acceptance of the arbitration clause was unqualified or unconditional.

Nor is any attempt made to deny that without an unqualified and unconditional acceptance of the arbitration provision there could be no binding contract to arbitrate.

This is not a case of rescission or repudiation of an existing contract, but a case of no contract ever having come into existence because the financial conditions qualifying the acceptance of respondent were not performed.

The misrepresentations in the Petition as to alleged "performance under the instrument dated October 1, 1959" (pp. 2, 3, 5), are also highly misleading.*

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* Since the acceptance of respondent is plainly qualified by unambiguous language, parol extrinsic facts are inadmissible to vary or contradict the written instrument (*Brainard* v. *New York Cent. R. Co.*, 242 N. Y. 125, 133 (1926), *St. Regis Paper Co.* v. *Hubbs & Hastings Paper Co.*, 235 N. Y. 30, 35, 36 (1923)), which could not be amended orally (51).

Title to the equipment owned by respondent and covered by the proposed agreement was never transferred to petitioner (122, 130) and accordingly there was no lease-back of any of this equipment. This was not done because the conditions precedent to the acceptance of respondent becoming binding were never performed by petitioner. Thus the transaction contemplated by the proposed agreement was never performed by either party.

The things which were not done during the period which was provided for the performance of the financial conditions, as well as the things which were done, show clearly that the parties recognized that there was no binding contract in effect. For convenient reference, the facts in this regard are more fully set forth in Appendix A annexed hereto.

The Opinions Below.

The District Court's opinion was that the issue of whether or not the financial conditions were performed, waived, or excused, concerning which there was a sharp controversy, (17, 31-37, 99, 106-108; also A-1 to A-3 in Appendix of respondent's Reply Brief below), was for the arbitrators to decide (pp. 26, 45-46 Appendix of Petition).

The Court of Appeals reversed and remanded the case to the District Court for a trial on this issue, pointing out that the acceptance of the arbitration clause was specifically qualified by the requirement that these financial conditions first be performed and that, therefore, arbitration could not be compelled unless and until it was found that the financial conditions were performed, waived, or excused (pp. 26-27 of Petition).

The minority opinion below goes on the erroneous premise that the financial conditions were "conditions precedent

to the contract generally", but were "not expressly made conditions precedent to arbitration" (p. 28, Appendix B of Petition). This is directly contrary to the specific language used in the instrument itself (83), as pointed out by the majority opinion below:

> "This conditional acceptance expressly applied to 'this agreement consisting of sections one through thirteen inclusive and attachments one through seven inclusive totaling fifty-four pages'—i.e., it applied to the entire instrument." (p. 21, Appendix B of Petition), . . . "Every clause including the arbitration clause was expressly so conditioned" (p. 23, Appendix B of Petition).

I. The Basic Principles of Law Are Not in Dispute.

The principle of law applied in this action by the Court below that there must be an unqualified acceptance by both parties of an arbitration clause before it becomes effective and enforceable as a contract, is a rule of general application to contracts, which is time honored, universally accepted, and recognized in all state and federal courts.

> *Williston on Contracts* (3rd Ed. 1957), Vol. 1, §§72, 77;
> *Iselin* v. *United States*, 271 U. S. 136, 139 (1926);
> *Columbia Malting Co.* v. *Clausen-Flanagan Corporation*, 3 F. 2d 547, 549 (2d Cir. 1924);
> *Poel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 319 (1915);
> *Schenectady Stove Co.* v. *Holbrook*, 101 N. Y. 45, 48, 49 (1885).

When the acceptance of the terms of a proposed contract is made "subject to compliance" with certain conditions

within a specified time, the conditions must be met before there will be a binding contract. *United Engineering & Contracting Co.* v. *Broadnax*, 136 Fed. 351, 354 (2d Cir. 1905), cert. denied, 197 U. S. 624 (1905); *F. W. Berk & Co.* v. *Derecktor*, 301 N. Y. 110, 112 (1950).

It is equally well settled that if there is a dispute as to whether or not a contract to arbitrate was made, this dispute cannot be decided by arbitrators, but must be decided by a trial before the court, as the Court below decided here. This is specifically provided by both the Federal and New York Arbitration statutes, and is uniformly recognized by the cases.

9 U. S. C. A. §4;
New York Civil Practice Act §1450;
Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985 (2d Cir. 1942);
In Re Kinoshita & Co., 287 F. 2d 951, 953 (2d Cir. 1961);
In Re Kramer & Uchitelle, Inc., 288 N. Y. 467, 472 (1942);
S. M. Wolff Company v. *Tulkoff*, 9 N. Y. 2d 356, 363 (1961).

II. There is No Conflict as to the Principles of Construction Applied.

The construction of the instrument involved here to determine whether there was an unqualified acceptance by both parties of the arbitration clause involved a careful examination of the entire instrument to determine the intent of the parties as revealed by the language used. This method used by the Circuit Court of Appeals to determine whether or not a contract to arbitrate was made is in accordance with well established principles of construction

which are applied in both the Federal and New York State courts.

United States v. *Moorman*, 338 U. S. 457, 462, 463 (1950);
In Re Pahlberg Petition, 131 F. 2d 968, 970 (2d Cir. 1942);
Cir. 1942);
Marchant v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299 (1929);
Brainard v. *New York Cent. R. Co.*, 242 N. Y. 125, 133 (1926).

Not a single case is cited by the petitioner to show that there is any conflict between the Federal and New York courts with respect to the principles of construction applied by the majority opinion below.

As Chief Judge Cardozo of the New York Court of Appeals stated, in *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), (p. 299):

> "The question is one of *intention*, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness." (Emphasis added.)

This language of the New York Court of Appeals is quoted by the majority opinion below (p. 24 in Appendix B of Petition).*

* The recent case of *Exercycle Corporation* v. *Maratta*, 9 N. Y. 2d 329, 334 (1961) also quotes language from the *Marchant* case that the intention is controlling, as we shall show.

To say that there is any rule of construction in either the Federal or New York State courts which disregards the plain language and intent of the parties, and compels arbitration regardless of a contrary intent specifically expressed is wholly untenable.

III. The Application of these Well Settled Principles of Construction to this Particular Instrument Only Concerns These Parties and is Not a Matter of General Importance Which this Court Should Consider.

The action of the Court of Appeals merely involved: (a) following the well settled principle that there must be a contract to arbitrate before compelling arbitration and (b) construing the particular instrument involved herein, under ordinary principles of contract construction, and finding, that since the acceptance by respondent of the arbitration clause was qualified by the requirement that certain financial conditions first be performed, there must be a trial to determine the dispute as to whether or not these financial conditions were performed, waived, or excused.*

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* The conditional acceptance by respondent constituted a counter-offer, which called for actual performance of the financial conditions before respondent would be bound by any of the terms of the instrument dated October 1, 1959, including the arbitration clause.

Moreover, petitioner did not promise anywhere in what it signed to perform these financial conditions within 14 days. This was merely a condition attached to respondent's acceptance, which, if not performed, would prevent petitioner from acquiring a right, but subjected petitioner to no liability.

As Williston on Contracts (Revised Ed. 1936), Vol. 3 §665 states:

> "Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability."

Thus, the determination of whether or not there was a contract to arbitrate in this particular case involves the construction of a specific and unique instrument, which only concerns these parties. No question of general importance is involved because the principles applied by the Court below are well settled under both the Federal and New York cases.

IV. The Reasons Urged by the Petitioner are Without Merit.

The contention (p. 6 of Petition) that this case raises important and novel questions of "statutory construction" which were raised in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), cert. granted 362 U. S. 909 (1960), is incorrect. In this connection it is argued that under the Federal Arbitration Act the arbitration clause should be considered separable as a rule of statutory construction (p. 9 of Petition).

However, in the instant case, even if the arbitration clause were considered separable from the other terms of the instrument, this would make no difference because, in any event, the acceptance by respondent of the arbitration clause was qualified and conditional upon certain financial conditions first being performed. Therefore, the dispute as to whether these financial conditions were performed must be decided by the court before arbitration could be compelled. Thus, we have here, as the Court below held (pp. 23-24 in Appendix B of Petition), a "language obstacle" to finding that there was a separate contract to arbitrate whether the financial conditions were performed because these financial conditions qualified the acceptance of the arbitration clause itself.

There was no language obstacle to separability in the *Lawrence* case. There the Court found "a valid agreement to arbitrate" (p. 411) because the alleged fraud did not relate to the arbitration clause. The Court specifically stated, however (p. 411):

> "[If this be no arbitration . . . induced by f

and added that if there were an issue with respect to it to whether the arbitration clause was induced by fraud there there would have to be "a judicial trial of that question" (p. 411). 411).

Thus, the *Lawrence* case makes it plain that anything thing relating to whether or not a binding contract to arbitrate trate was entered into must first be decided by the court, rather ither than by arbitration, which is precisely what the same Cir Circuit Court held here.

Arbitration is based on the consent or agreement of the f the parties.* It is not imposed without consent, by statute tute. The statutes merely implement their intent. This is rec recognized by the *Lawrence* case, where the Court says (p. 41). 410 of Opinion), "parties are entitled to agree, should they they desire to do so", that one of the questions for arbitration tion shall be whether or not the other terms were induced by d by fraud. On the other hand, they may stipulate, as in thi this case, that certain financial conditions must be met befor fore

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* House Report No. 96-68th Congress, 1st Sess, dated January 24, 1924 to accompany H. R. 646, refers to The Federal Arbitration Act as follows: Arbitra-

"To Validate Certain Agreements for Arbitration, on.

* * *

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs."

the arbitration clause, as well as the other terms, will become effective. Then, the court must decide, before compelling arbitration, whether or not the financial conditions were met, as the Court below held in this case.

We shall now examine the list of points urged by petitioner, and briefly indicate why they are untenable.

1) It is argued (p. 7) that there is a conflict between the Circuits as to the applicability of State law. The answer to this is three-fold:

a) Petitioner in the Courts below urged that Federal law was controlling. In fact, in petitioner's brief before the District Court, it was specifically stated (p. 11):

> "This Court need not follow New York law in deciding this petition to arbitrate" (citing *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*).

In accordance therewith, the District Court found that the parties had stipulated that Federal law governed, (p. 40, Petition), and the Circuit Court held that under the circumstances this finding was proper (footnote on p. 20, Appendix B of Petition).

Petitioner now seeks to reverse itself and argues for the first time that New York law applies.

We respectfully submit that even if there were a conflict between New York and Federal law, which is not the case, petitioner is not in a position to raise the matter at this late date, having taken the opposite position below.

> *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 5, 6 (1917);
> *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328 (1945).

b) Contrary to the claim of the Petition (p. 8, 11) the Circuit Court held here that a stipulation of the parties

made Federal law applicable (footnote on p. 20 in Appendix B of Petition) but nevertheless considered New York State law at length in the majority opinion (pp. 24-26, Appendix B of Petition) and found no conflict therein with its decision here.

c) Actually, there is no conflict between New York and Federal law with respect to the action of the Court of Appeals herein. Both jurisdictions require a contract to arbitrate before compelling arbitration and where there is a dispute as to whether financial conditions qualifying the acceptance of the arbitration clause have been performed, waived, or excused, this issue must be determined by a trial because this involves whether or not the arbitration clause became effective and binding, which must be decided by the court, and not by the arbitrators themselves. Arbitrators cannot decide the question of their own jurisdiction, or whether a contract to arbitrate was made. None of the cases cited in the Petition are to the contrary.

In *Petition of Uraga Dock Company*,* 6 App. Div. 2d 443 (1st Dep't 1958), aff'd. 6 N. Y. 2d 773 (1959) (p. 9 of Petition), the Court found that the parties by their language intended a binding contract immediately upon the signing of the instrument so that mutual obligations, including the arbitration clause, became effective upon the signing. There was no language qualifying the acceptance of the arbitration clause such as we have here.

In *Exercycle Corporation* v. *Maratta*, 9 N. Y. 2d 329 (1961) (p. 9 of Petition), the New York Court of Appeals found that the parties "agreed to arbitrate" and that the agreement was broad enough to cover the question of whether or not there was mutuality with respect to the

* Distinguished by the Court below, p. 25 in Appendix B of Petition.

other terms of the agreement, so that the question of mutuality as to these other terms was for the arbitrators to decide. There was no qualification in the acceptance of the arbitration clause, such as we have here.

In *DeLaurentiis v. Cinematografica, Etc.*, 9 N. Y. 2d 503 (1961) (p. 10 of Petition) the New York Court of Appeals again found that there was a contract to arbitrate made by the parties and that the alleged illusory nature of the other provisions was a matter for the arbitrators to decide because it came within the scope of the broad arbitration clause. Again, the acceptance of the arbitration provision was not qualified or conditional as in the instant case.

In these New York cases there was no language obstacle to considering the arbitration clause effective and binding upon the signing so that any dispute coming within its scope would be for the arbitrators to decide. Similarly, the Court of Appeals for the Second Circuit found no language obstacle in the *Lawrence* case.

The opinion of the Second Circuit Court of Appeals in *In Re Kinoshita & Co.* 287 F. 2d 951, which was decided March 16, 1961, less than a month before it decided the instant case, April 10, 1961, was written by Judge Medina who wrote the opinion in the *Lawrence* case. It stated that under principles of the *Lawrence* case (p. 952):

> ". . . we must first examine the record to ascertain whether there is any factual obstacle to considering the arbitration clause as separable. . . ."

Thus, the vital point in the instant case, (pp. 21-24 in Appendix B of Petition) is that there is here a language obstacle to regarding the arbitration clause as binding and effective because this clause, like each and every other term, was specifically referred to in the instrument and then only

qualifiedly accepted by respondent, expressly subject to compliance with the financial conditions within 14 days.

There is nothing in the New York cases to indicate that where there is a language obstacle, making it clear that the arbitration clause is only qualifiedly and conditionally accepted subject to certain conditions first being performed within a certain time, that the New York courts will compel arbitration before these conditions have been performed, waived, or excused.

On the contrary, the New York Court of Appeals in the *Exercycle* case, 9 N. Y. 2d 329 (1961), quoted with approval from *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. at p. 298 as follows (p. 334):

> "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will *give effect to their intention.*" (Emphasis added)

Then the Court stated certain situations in which the Court will enjoin arbitration, one of which is where there is "a condition precedent to arbitration" (p. 335).

The opinion (Fuld J) then states (p. 336):

> ". . . there is no suggestion of . . . an unfulfilled condition precedent to arbitration (Cf., e.g., Matter of Board of Educ. [Heckler Elec. Co.], 7 N. Y. 2d 476, 199 N. Y. S. 2d 649 *supra*)."

Thus, the *Exercycle* opinion cites *Board of Education, etc.*, v. *Heckler Elec. Co.*, 7 N. Y. 2d 476 (1960), which is also cited by the Court below (p. 25, Appendix B of Petition), where the New York Court of Appeals stated with reference to the language used in previous cases (p. 481):

> ". . . we did not mean thereby to suggest that the arbitrator possesses the power to decide whether the conditions precedent to the institution of the arbitration proceeding itself had been fulfilled."

Moreover, in *S. M. Wolff Company* v. *Tulkoff*, 9 N. Y. 2d 356 (1961), decided by the New York Court of Appeals seven days after the *Exercycle* case, Judge Fuld, who wrote the majority opinion in the *Exercycle* case, speaking for the Court, remanded the case to the lower Court for a trial to determine whether there was "a contract to arbitrate," stating (p. 363):

> "The factual dispute concerning the making of a contract to arbitrate, outlined above, consists essentially of a disagreement over whether the parties' initial telephone conversations 'closed the deal' or whether they were preliminary, or subject, to the subsequent 'Bought Notes' containing the arbitration clause. . . . This must be resolved at a hearing to be held at Special Term."

Thus, it is abundantly clear that the decision below in ordering a trial to determine whether there was a contract to arbitrate, by performance of the conditions qualifying the acceptance of the arbitration clause, is not in conflict with the New York Court of Appeals.

2) Petitioner argues (p. 8-9) that under the doctrine of the separability of the arbitration clause enunciated by the Court of Appeals in the *Lawrence* case, 271 F. 2d 402, the decision of the District Court should have been affirmed. This is not correct.* As we have seen, Judge Medina, who

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* Chief Judge Lumbard of the Court of Appeals, Second Circuit, was a member of the panel that decided the *Lawrence* case and he voted to deny the petition for rehearing by the Court en banc in the instant case (R. 66).

wrote the opinion in the *Lawrence* case, pointed out in the *Kinoshita* case, 287 F. 2d 951 that the doctrine of separability does not apply where the record shows that there is a language obstacle.

Accordingly, the Court below examined the record in the instant case and found, as the majority opinion states (p. 23 in Appendix B of Petition) as follows:

> "A complete reading of the contract discloses that Aminoil sought to protect itself from being bound by the agreement until the bidder met the conditions incumbent upon it initially to meet. There is no reason in fact or in law for a frustration of this clearly demonstrated intent."

And also (p. 24 in Appendix B of Petition):

> "In the present case the document before us is an integrated document where every clause, including the clause providing for arbitration, that binds both parties is carefully conditioned on the prior performance of the specified conditions by one of these parties. We find this fact to be a clear and unambiguous obstacle to a separability of the arbitration clause from the remainder of the agreement, and we read the entire contract as demonstrating a clear intent on the part of both parties not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions."

Clearly, there was a "language obstacle" to finding a separate contract to arbitrate whether the financial conditions were performed because these financial conditions qualified the acceptance of the arbitration clause itself.

Even where the arbitration clause is regarded as separable, it must nevertheless be unqualifiedly accepted before a contract to arbitrate is made, and here the financial conditions qualified the acceptance of the arbitration clause

so the question of whether they were performed, waived, or excused relates to whether a contract to arbitrate was made, which is for the court to decide, *9 U. S. C. A. §4.*

As Chief Judge Cardozo stated in *Finsilver, Still & Moss* v. *Goldberg, Maas & Co.*, 253 N. Y. 382 (1930) (p. 391):

> "In the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation."

To say that when an arbitration clause is put in a proposed contract there is always a separate contract to arbitrate when the instrument is signed, regardless of the language used and the intent of the parties, is obviously unwarranted.

3) We have already shown that the decisions in New York which are cited in the Petition (pp. 9-10) are not in conflict with the decision of the Court below in the instant case.

The suggestion that there is a "liberal" doctrine now in vogue in the New York courts which disregards the language and the intent of the parties, and holds that there is an arbitration contract even where the language and intent is to the contrary, is wholly unjustified.

4) The contention (pp. 11-12) that the decision of the Court of Appeals ignores the wording of Section 2 of the Federal Arbitration Act is without merit. The language of Section 2 referred to by the Petition (pp. 11-12) limits the area of attack on the enforceability of the arbitration provision *when a contract to arbitrate has been made* to "such grounds as exist at law or in equity for the revocation of any contract." Obviously, however, a contract to arbitrate must first be made before arbitration can be com-

pelled, as specifically provided in Section 4 of the Federal Arbitration Act. Therefore, when, as in this case, the arbitration clause did not become effective because it was only qualifiedly accepted and the conditions qualifying the acceptance were never fulfilled, clearly there can be no specific performance of an alleged contract to arbitrate because the contract to arbitrate must first come into existence by performance of the conditions precedent.

5) Section 4 of the Federal Arbitration Act specifically requires that there be a trial where there is an issue as to whether or not a contract to arbitrate was made.

Petitioner argues (p. 13) that the language of Section 4 requiring "the making" of "an agreement for arbitration" before compelling arbitration, merely requires that there be a "factual execution of the paper containing the arbitration provision". This is obviously untenable. When the paper signed says in plain words that the arbitration clause is not to become effective until certain conditions are first met, how can this language be disregarded unless indeed, petitioner is arguing that there need be no contract to arbitrate in order to compel arbitration, which is directly contrary to both the Federal and New York statutes as we have seen.*

The Petition (p. 13) goes on the theory that failure to perform the financial conditions would not affect the arbitration clause but would merely involve "defective per-

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* *Wilko* v. *Swan*, 346 U. S. 427 (1953) (pp. 7, 13, 14 of Petition) construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. Therefore, it in no way supports petitioner.

In *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) (pp. 7, 8, 11, 14 of Petition) a stay of an action in Vermont so that the controversy could go to arbitration was denied on the ground that Vermont law governed since jurisdiction was based on diversity of citizenship and that the arbitration agreement was revocable under Vermont law. This in no way aids petitioner here.

formance of the rest of the agreement", which overlooks the vital point that the financial conditions qualify the acceptance by respondent of the arbitration clause. Moreover, petitioner is putting the cart before the horse in suggesting that the arbitration clause rather than the acceptance clause is controlling (p. 13 of Petition) in a dispute as to whether a contract to arbitrate was made. The language of an arbitration clause indicates what is arbitrable if the clause becomes effective but obviously cannot determine a dispute as to whether it became effective because that is not arbitrable as a matter of law, 9 U. S. C. A. §4.

6) There is no conflict between the Federal and New York State Arbitration Acts with respect to the action of the Court of Appeals in ordering a trial here. Instead, both Acts provide that there must be a judicial trial where there is an issue as to whether or not a contract to arbitrate was made (9 U. S. C. A. §4, New York Civil Practice Act §1450). Moreover, in determining whether a contract to arbitrate was made, the intention of the parties as shown by the language used clearly is decisive under both the Federal and New York cases, as we have shown.

In the instant case, by specific and express language, the financial conditions qualify the acceptance of the arbitration clause as well as the acceptance of the other terms of the instrument. Therefore, they were conditions precedent to the existence of a contract to arbitrate. Accordingly, a dispute as to whether or not these conditions precedent to arbitration were performed, waived, or excused must be decided by a trial.

Conclusion.

The decision of the Court of Appeals was based on a careful analysis of the record in this case and an accurate application of the relevant legal principles. There is no conflict concerning these principles. Therefore, no issue is presented which is appropriate for consideration by this Court. It is submitted that the decision was in all respects correct and the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

What was done during the period provided for the performance of the financial conditions, did not constitute any recognition that the instrument dated October 1, 1959 was binding as shown by the following*:

(a) Respondent wrote a letter dated September 27, 1959 (93), which was delivered just before the instrument dated October 1, 1959, was signed (105) which stated specifically that petitioner's bid was accepted only "Subject to Conditions on page 54 of said Tender", which were the financial conditions, and referred also in the first paragraph of said letter to these as "conditions precedent of the contract" (93). Respondent also explained this orally to petitioner before the signing (87-88, 104-105).

(b) The Petition claims (p. 3) that on or about October 1, 1959, "respondent delivered the purchased equipment to the petitioner".

Actually, on a provisional basis, not provided for at all by the instrument dated October 1, 1959, but in anticipation that the financial conditions would be performed within 14 days and the proposed agreement would then become binding (88, 105, 108-111), respondent turned over to petitioner physical possession (not title) of part of the equipment on the explicit understanding stated in a letter from respondent to petitioner dated October 3, 1959 that it was "conditional on your compliance with all the conditions of the contract and no asset may be removed from the Company's operational area prior to your compliance with the terms and conditions of the contract" (431).

(c) Respondent granted an extension to petitioner by letter dated October 23, 1959 in which the financial conditions are specifically referred to as "*conditions*

* This is dealt with in detail in the Reply Brief, pp. 11-20, on behalf of appellant in the Court below, respondent here.

precedent to the agreement'' (140). (Emphasis added)

These letters show that none of the acts of alleged "performance" were either done or received as such by respondent, and as *Williston on Contracts,* (3rd Ed. 1957), Vol. 1, §28A, points out:

> " . . . acts of performance by one party, unless they have been received as such by the other, cannot be evidence that the latter either had previously made an agreement on definite terms, or that he had subsequently assented to a contract."

(d) The second extension letter by respondent to petitioner dated November 9, 1959, granting an extension to November 20, 1959, to perform the financial conditions, refers to the "*proposed* transport leasing agreement dated October 1, 1959" and to the fact that during "the interim period, the operation is to continue as it has since October 1st, with Aminoil retaining title but the El-Hoss Engineering and Transport Company assuming responsibility for the operation and maintenance of the equipment" (130). Thus, respondent made it clear that the operation and maintenance by petitioner during this interim period did not change the fact that the instrument dated October 1, 1959, was only a "proposed agreement" unless and until the financial conditions were performed.

(e) Petitioner recognized by letter that during the "interim period" allowed for performing the financial conditions, replacements of equipment were not made as provided for, but were "postponed till such time as we stood on firm ground" but said they would be made "as soon as this contract is crystallized" (126-129).

(f) The instrument dated October 1, 1959, does not provide for turning over custody of any equipment to petitioner prior to transferring title or for any transportation services by petitioner prior to its obtaining

title so that it could lease it back to respondent. Therefore, this was not done under that instrument but on a temporary provisional basis in anticipation that the financial conditions would be performed within 14 ddays so that the instrument would become effective (888-91, 108-111).

(g) The Petition claims (pp. 2, 5) that respondent notified petitioner to "cease operations under the aggreement". Actually, the letter stated that "all neggotiations and operations are to cease under the *proposed* transportation and tariff haul agreement dated October 1, 1959, between American Independent Oil Company and El-Hoss Engineering and Transport Company (said agreement having never come into existence)" (160) (Emphasis added).

(h) The record (89-91, 108-111) points out that the sale and lease back contemplated in the instrument dated October 1, 1959, were not made during this interim period for finalizing the contract. Petitioner even failed to make the payments upon the signing, which were specifically provided for (53-64, 89-90). Yet, this was not considered a breach because said instrument was not a contract unless and until the financial conditions were first performed.